

STATE OF MICHIGAN
COURT OF APPEALS

JOHN A. MUNDELL, JR., and EVELYN
COLLEEN MUNDELL,

UNPUBLISHED
November 23, 2004

Plaintiffs,

and

DLJ MORTGAGE CAPITAL, INC.,

Intervening Plaintiff-Appellee,

v

CHARLES MCCLURE and SARAH MCCLURE,

No. 246253
Oakland Circuit Court
LC No. 01-034878-CH

Defendants-Appellants.

Before: Cavanagh, P.J., and Kelly and H. Hood*, JJ.

PER CURIAM.

Defendants appeal as of right an order granting summary disposition to plaintiffs John A. Mundell, Jr. and Evelyn Colleen Mundell.¹ We affirm.

I. Basic Facts and Procedural History

The evidence presented to the trial court demonstrates that in 1976 the Mundells purchased Lot 22 in a Bloomfield Hills subdivision and later built a home on the lot. Defendants currently reside in a home on Lot 21. Since the time the Mundells built their home, Lot 21 has had four owners. In 1976, the Fuller family owned Lot 21. The Mundells maintained the property up to the edge of the Fullers' grass, which was on the Fullers' side of the lot line. In 1988, Thomas Carpenter and Deborah Carpenter bought Lot 21 from the Fullers and installed a

¹ After defendants filed their claim of appeal, they filed a motion to substitute DLJ Mortgage Capital, Inc. as an intervening plaintiff. This Court remanded the case to the trial court where the trial court granted the motion. Thereafter, this Court also granted the motion.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

fence for their dog. The fence was not placed on the lot line but instead was installed 23.17 feet from the actual plotted lot line in an area of trees, which corresponded with the edge of the Fullers' grass. This fence was subsequently replaced twice, both in the same location as the first fence. At all times, the Mundells have maintained the area up to the fence line, keeping it cleared and landscaped. It is undisputed that the Mundells were aware of the actual location of the lot line.

After the Mundells were informed that defendants intended to remove the fence on Lot 21 and place it on the actual lot line, the Mundells filed a complaint for adverse possession, or, in the alternative, acquiescence of the property up to the fence line. Both parties moved for summary disposition. The Mundells argued that both parties had acquiesced to the lot line marked by the fence, and, therefore, the property in dispute belonged to the Mundells. Defendants argued that the Mundells did not meet the statutory period of acquiescence because the earliest the fence was installed was 1988. In support of their motion for summary disposition, defendants included an affidavit of Deborah Carpenter, which attested that she was aware of the location of the lot line and the fence was put inside the lot line so that it would be more pleasing. After a hearing, the trial court disregarded the affidavit ruling that it "lacked merit" because it contradicted Thomas Carpenter's statements on the seller's disclosure form, indicating that there were no encroachments on the property. The trial court determined that the evidence demonstrated that the Mundells treated the disputed portion of land as their own, maintained it for approximately twenty-two years without protest from defendants or any predecessor in title, and were under no obligation to inform defendants or any of their predecessors of the actual location of the property line. Granting the Mundells' motion for summary disposition, the trial court ruled that there was no genuine issue of material fact as to whether the Mundells acquired the property by acquiescence under the fifteen-years statute of limitations. The trial court denied defendants' motion for reconsideration.

II. Analysis

Defendants argue that the trial court erred in granting the Mundells' motion for summary disposition. In evaluating a motion for summary disposition under MCR 2.116(C)(10), a court considers the entire record, including affidavits, pleadings, depositions, admission and other evidence. Viewing the record in the light most favorable to the nonmoving party, the court determines the factual sufficiency of the complaint. If the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

To begin with, the trial court erred in ruling that it could not consider the affidavit of Deborah Carpenter. Relying on *Griffith v Brandt*, 177 Mich App 583, 587-588; 442 NW2d 652 (1989), and *Peterfish v Frantz*, 168 Mich App 43, 54-55; 424 NW2d 25 (1988), the trial court ruled:

The affidavit of Mrs. Carpenter lacks merit regarding the property line since it seemingly contradicts her husband's statements on the sellers disclosure statements for the property. The disclosure statements signed by Mr. Carpenter did not note the encroachment by plaintiffs on either property disclosure statement. Thus under case law Mrs. Carpenter's affidavit should not be allowed to contradict the sellers disclosure statements.

Griffith and *Peterfish*, however, hold that a single plaintiff is not permitted to create a genuine issue of material fact by submitting an affidavit that contradicts her sworn deposition testimony. *Cunningham v Dearborn Bd of Educ*, 246 Mich App 621, 635; 633 NW2d 481 (2001). Accordingly, we conclude that the trial court improperly discounted the affidavit because it did not contradict the affiant's own prior deposition testimony, but rather, her husband's prior statements.

Nonetheless, the trial court properly granted plaintiff's motion for summary disposition on the theory of acquiescence. There are three theories for acquiescence. "They include: (1) acquiescence for the statutory period; (2) acquiescence following a dispute and agreement; and (3) acquiescence arising from intention to deed to a marked boundary." *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996). The fifteen-year statutory period theory applies in this case. MCL 600.5801(4). Under this theory of acquiescence, if adjoining property owners acquiesce to a boundary line for a minimum of fifteen years, that line becomes the actual boundary line. The rule was established to promote the peaceful resolution of boundary disputes. "The acquiescence of predecessors in title can be tacked onto that of the parties in order to establish the mandated period of fifteen years. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001).

The evidence presented to the trial court demonstrated that the Mundells cleared and landscaped their property up to the fence line on Lot 21 since 1976. The Mundells removed trees, planted ferns, evergreens, hostas, and shrubs on both sides of the lot line, and have maintained and improved the disputed property without objection from the Fullers, Carpenters, or defendants. Accordingly, the trial court did not err in ruling that there was no genuine issue of fact regarding whether the Mundells acquired the disputed property by acquiescence.

Defendants argue that the trial court erred in failing to apply the clean hands doctrine, *Rose v Nat'l Bank & Trust Co v Morren*, 466 Mich 453, 462-463; 646 NW2d 455 (2002), because the Mundells knew at all times the location of the actual lot line. But the doctrine of acquiescence does not require that a party disclose his knowledge of the actual boundary lines. A claim of acquiescence does not require that the possession of land be hostile or without permission. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

Therefore, we conclude that the trial court did not err in granting summary disposition to the Mundells. Because the trial court made no palpable error that would have resulted in a different disposition, it did not abuse its discretion in denying defendant's motion for reconsideration. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000); MCR 2.119(F)(3).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Harold Hood